

# Standing Up for Flast: Taxpayer and Citizen Standing to Raise Constitutional Issues

BY DAVID S. BOGEN\*

## INTRODUCTION

Individual citizens and taxpayers have occasionally sued the federal government for alleged violations of the Constitution even though the alleged violation did not deprive the plaintiffs of any property or freedom.<sup>1</sup> The thrust of these suits has been that the government has violated its obligations to its citizens and taxpayers by exceeding constitutional limits. The Supreme Court has consistently held that such plaintiffs lack standing to sue.

One exception to this pattern was *Flast v. Cohen*.<sup>2</sup> In *Flast*, the Court held that taxpayers had standing to challenge federal expenditures which allegedly violated the constitutional prohibition against establishment of religion. The Court based its holding on a finding that such taxpayers had a "personal stake" unlike that of citizens or taxpayers in other non-injury suits. In subsequent cases, the Supreme Court has purported to distinguish *Flast* or has displayed hostility toward it.<sup>3</sup> The present position of the Court on the standing of citizens or taxpayers to raise constitutional issues is uncertain.<sup>4</sup> This article examines the bases for expanding or limiting such standing and proffers a rationale for the Court's decision in *Flast v. Cohen*.

---

\* Professor of Law, University of Maryland. B.A. 1962, LL.B. 1965, Harvard; LL.M. 1967, New York University.

<sup>1</sup> See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Flast v. Cohen*, 392 U.S. 83 (1968); *Ex parte Levitt*, 302 U.S. 633 (1937); *Frothingham v. Mellon*, 262 U.S. 447 (1923).

<sup>2</sup> 392 U.S. 83 (1968).

<sup>3</sup> See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974). In *Richardson*, Justice Powell said, "I . . . would lay rest to the approach undertaken in *Flast*." *Id.* at 180.

<sup>4</sup> See, e.g., *United States v. Richardson*, 418 U.S. 166 (1974). In *Richardson*, Justices Marshall, Stewart, Brennan, and Douglas disagreed with the plurality's use of *Flast* to deny standing. *Id.* at 185-207.

## I. FLAST V. COHEN: THE CASE IN CONTROVERSY

In *Flast v. Cohen*,<sup>5</sup> taxpayers claimed that federal expenditures made to finance instruction and to purchase textbooks and other materials in parochial schools violated the establishment and free exercise of religion clause of the first amendment. The three-judge lower court held that the taxpayers lacked standing.<sup>6</sup>

The Supreme Court noted that the question of standing concerns whether the party bringing suit is a proper party, not the justiciability of a particular issue.<sup>7</sup> At a minimum, the case and controversy limitation on federal court jurisdiction<sup>8</sup> requires that the parties be adverse so they will raise and thoroughly argue opposing views. This adversity must be the product of something more than the mere fact that the parties are on opposing sides.

The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverse-ness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'<sup>9</sup>

In *Flast*, the Court found the requisite "personal stake" because the plaintiffs satisfied a two-nexus test:

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute . . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the tax-

---

<sup>5</sup> 392 U.S. 83 (1968).

<sup>6</sup> *Flast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y. 1967). The expenditures had been made under the Elementary and Secondary Education Act of 1965.

<sup>7</sup> 392 U.S. at 99-100.

<sup>8</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>9</sup> 392 U.S. at 99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

payer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.<sup>10</sup>

Justice Harlan contended that the Court's criteria did not demonstrate a "personal stake." There was no suggestion that any tax was improperly levied or that the challenged expenditure affected the taxpayer's tax burden. If the government did not spend the money for the challenged purpose, it would have spent it for another purpose or incurred a smaller deficit. The taxpayer did not and could not request a return of funds. The only connections taxpayers *qua* taxpayers have to the government are that they are within its sovereign power (as citizens, residents, or persons owning or receiving assets within the territory of the taxing power), and have, through a tax, paid the government money that has become part of a general fund which is used to pay governmental expenditures.<sup>11</sup>

Although Justice Harlan argued that taxpayers should not have standing in the *Flast* situation,<sup>12</sup> he agreed that the taxpayer seeking to stop allegedly unconstitutional action by his government is sufficiently adverse to present a "case" or "controversy" within the meaning of Article III.<sup>13</sup> However, since the taxpayer is "non-Hohfeldian,"<sup>14</sup> the relief requested

---

<sup>10</sup> *Id.* at 102-03.

<sup>11</sup> *Id.* at 116-19.

The relief available to such a plaintiff consists entirely of the vindication of rights held in common by all citizens . . . [T]he United States holds its general funds, not as stockholder or trustee for those who have paid its imposts, but as surrogate for the population at large.

*Id.* at 118-19 (Harlan, J., dissenting).

<sup>12</sup> *Id.* at 116 (Harlan, J., dissenting).

<sup>13</sup> *Id.* at 130, 131 n.21 (Harlan, J., dissenting).

<sup>14</sup> Justice Harlan stated:

I have here employed the phrases "Hohfeldian" and "non-Hohfeldian" plaintiffs to mark the distinction between the personal and proprietary interests of the traditional plaintiff, and the representative and public interests of the plaintiff in a public action.

*Id.* at 119 n.5.

The "non-Hohfeldian" plaintiff seeks "vindication of rights held in common by all citizens"; he cannot ask for damages. Rather, he invokes the court's power to order particular behavior by government officials. Such orders are equitable in nature and the courts in such cases have traditionally considered whether under all the circum-

is equitable in nature and the Court has power to determine whether such relief should be granted. Justice Harlan concluded that unless such plaintiffs were given standing by Congress, the likelihood of a substantial increase in the number of generalized grievances about the conduct of government made it wise to refuse to give relief to such plaintiffs.<sup>15</sup> In contrast, Justice Douglas' concurrence in *Flast* was based on the proposition that citizens should act as "private attorneys general" to make certain that the Constitution is followed.<sup>16</sup>

As noted by Justice Harlan, the *Flast* criteria are not necessary to achieve the "adverseness" which results from one having a personal stake in the controversy. Justice Powell noted in *United States v. Richardson*, drawing on Harlan's dissent in *Flast*:

A plaintiff's incentive to challenge an expenditure does not turn on the 'unconnected fact' that it relates to a regulatory rather than a spending program . . . or on whether the constitutional provision on which he relies is a 'specific limitation' upon Congress' spending powers.<sup>17</sup>

Rather, a plaintiff who is concerned that tax revenues are being used for an unconstitutional program will be equally concerned regardless of whether the money is expended in direct grants or in administrative costs of a regulatory program. Indeed, some large regulatory agencies may be more costly than programs of direct aid to private schools.<sup>18</sup> The interest of the taxpayer is equally strong whether the expenditure is specifically prohibited or simply not authorized by the Constitution.

---

stances equitable relief is warranted. Even if the law has been violated, the equity court may refuse to grant remedies. See Comment, *Threat of Enforcement—Prerequisite of a Justiciable Controversy*, 62 COLUM. L. REV. 106, 126 (1962).

<sup>15</sup> 392 U.S. at 129 n.18 (Harlan, J., dissenting).

<sup>16</sup> "I would not be niggardly . . . in giving private attorneys general standing to sue." *Id.* at 111 (Douglas, J., concurring).

<sup>17</sup> *United States v. Richardson*, 418 U.S. 166, 183 (1974) (Powell, J., concurring).

<sup>18</sup> Federal funds expended for non-public schools under Titles I and II of the Elementary and Secondary Education Act of 1965 totaled \$50,175,000 in 1971. THE PRESIDENT'S COMMISSION ON SCHOOL FINANCE, PUBLIC AID TO NONPUBLIC SCHOOLS *v* (1971). Expenditures for the Interstate Commerce Commission and the Civil Aeronautics Board were \$71,127,000 and \$61,760,000 respectively for 1971. EXECUTIVE OFFICE OF THE PRESIDENT'S OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT 438, 467 (1972).

Persons may be more opposed to federal expenditures if the states are competent to act in the area in question than they would be to a program which violated a specific constitutional prohibition.<sup>19</sup>

A taxpayer's interest in these controversies, if he is not deprived of life, liberty, or property, is that the government should act in a constitutional manner. All citizens have a similar claim that the government should behave constitutionally: Since the powers and procedures of government were established and limited by agreement of the citizens,<sup>20</sup> the government has no claim to legitimacy apart from that agreement. As parties to the agreement, the citizens and their successors should have the ability to compel the government to conform to it. The taxpayer is limited to challenges of government expenditures, whereas the citizen may object to any government misbehavior. The citizen's standing to object to governmental activity in general should be analyzed in the same manner as the standing of taxpayers to object to expenditures.

The assertion that citizens should be able to compel the government to follow constitutional limitations does not inevitably lead to the conclusion that they have a right to invoke the judicial process for this purpose. Neither the language of Article III<sup>21</sup> nor the history of this right as an Article III "case or

---

<sup>19</sup> See, e.g., *Frothingham v. Mellon*, 262 U.S. 447 (1923). Conservative commentators, such as William F. Buckley, have been vociferous in their condemnation of federal control.

Let . . . localities experiment with different solutions, and let the natural desire of the individual for more goods, and better education, and more leisure, find satisfaction in individual encounters with the marketplace, in the growth of private schools, in the myraid economic and charitable activities which, because they took root in the individual imagination and impulse, take organic form, and then let us see whether we are better off than we would be living by decisions made between nine and five in Washington office rooms . . . .

W. BUCKLEY, *UP FROM LIBERALISM* 228-29 (1968).

<sup>20</sup> U.S. CONST. preamble.

<sup>21</sup> Dictionary definitions of "case" are circular. WEBSTER'S SEVENTH COLLEGIATE DICTIONARY 129 (7th ed. 1971) defines "case," as used in law, as "[a] suit or action in law or equity." If the power of the court to entertain a suit depends on whether it is a "case," the court can entertain a suit only if it is a suit.

The dictionary is even less helpful with respect to "controversy." Its use in article III to describe judicial power over matters involving a state or the United States as a party or diversity actions is not reflected in modern common usage. *Id.* at 182.

controversy”<sup>22</sup> compel a decision either way on the existence of such a right. The function of positing such a right is simply to assure the citizen’s ability to make the government obey the constitution. Therefore, the critical question should be whether the citizen’s desire to have the government conform to constitutional commands is most effectively secured by judicial review. If so, the right of the citizen to have the government obey constitutional provisions should be cognizable in court. This question should have been the focus of the Court in *Flast*. To decide whether the result in *Flast* was proper, it is necessary

---

<sup>22</sup> Although an inquiry into the rights of citizens and taxpayers at the time of the adoption of article III may be relevant to this question, such an examination is not helpful because the Constitution represented a radical change in the structure of government. In eighteenth-century England, the ultimate power to create, alter, and determine the framework of government rested with the King and Parliament. Parliament:

can regulate or new model the succession to the crown; as was done in the reign of Henry VIII and William III. It can alter the established religion of the land . . . . It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections.

1 BLACKSTONE COMMENTARIES 161 (6th ed. 1765). If there were objection to a governmental act, Parliament had the final authority as to the act’s propriety. Even action clearly contrary to established statute or custom could be legalized by Acts of Indemnity. A. DICEY, *THE LAW OF THE CONSTITUTION* 49-50 (10th ed. 1965). The citizen’s right not to be deprived of life, liberty, or property was coextensive with the sovereignty of Parliament. See D. KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485* at 294-95 (8th ed. 1966). All objections to the operations of government would have been addressed to Parliament, a political body, rather than to the judiciary. DICEY, *supra*, at 63. In other words, the English citizen in the eighteenth century had no right to a particular framework of government. *Id.* at 91.

The English citizen may have had an idea of natural law—of how government ought to be structured—but he had no conception that his ideas of the proper operations of government should be judicially enforceable. *Id.* at 47-48.

Meanwhile the new American nation was developing a unique governmental form. The American Revolution was originally justified in English terms. The King had violated the conditions under which his American subjects consented to be governed and, thereby, had justified the political act of revolution. See BAILYN, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 46-47 (1967). In the decade after independence, however, disenchantment with the English concept of representative rule grew. The will of the people was not identified with the acts of the state legislatures. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* at 280 (1969). The “people” were viewed as an entity distinct from their representatives. The Constitution was proclaimed as being established by “the people,” not legislatures. U.S. CONST. preamble. Only in America was the framework of government a product of a compact among the citizens. Thus, only in the United States could a citizen justifiably believe himself to have a right to have the government operate in a particular fashion.

to examine citizen standing with a view toward the effectiveness of vindicating citizens' constitutional rights in court in light of the interests of the parties.<sup>23</sup> Examination of these interests demonstrates that the Court reached the right result for the wrong reasons.

## II. THE INTEREST OF THE PARTIES

### A. *Non-Political Injury Suits: The Better Plaintiff Rule*

Whenever an unconstitutional governmental action injures a person (the "victim") or his property, all citizens of that government may feel injured as well. This feeling flows from several sources. They may perceive that, as electors, they are responsible for, and discredited by, the unconstitutional actions of the government. Further, as citizens, their relationship to the government is based on the Constitution, and violation of that document provides a potential threat to every citizen's relationship with his government.

Nevertheless, the courts will not permit all citizens to bring suit to halt the government's acts. It is thought that the victim will present the issues better and that separate suit by the citizen may result in poor decisions.

If a citizen brings suit, the court's natural response is to ask "why isn't the victim here?" If the victim does not feel sufficiently injured to seek redress, the injury appears minimal. The court is thus apt to give insufficient weight to the seriousness of the injury.

The presence of the citizen could also produce inadequate consideration of all possible issues. The injury to the citizen is basically an affront to his conception of the constitutional functioning of government. His concern with a particular constitutional guarantee may suppress any interest in exploring every possible defense to the governmental action. The affected individual is interested in all possible defenses. By taking only the victim's case, the court may discover that a non-constitutional

---

<sup>23</sup> "The interest of the parties" refers to the distinction between proprietary and political interests, compare section IIA *infra* with section IIB *infra*, as well as the further division between interests in common to all persons and interests applicable to minority groups, see section III *infra*.

issue will dispose of the problem or that several constitutional questions deserve consideration.

The vigor with which the citizen plaintiff will press the case may also be suspect. Since he stands to lose nothing in the way of personal property or freedom of action, he may raise an issue as idle speculation. Some citizens, either individually or supported by larger groups, would pursue the case vigorously on all grounds but others would not.

Other problems would arise if both citizens and victims were permitted to sue for injuries to the victim. Since the citizen's suit would not preclude a suit brought by the victim,<sup>24</sup> multiple law suits over the same factual problem would result. Further, the citizen's suit would be *stare decisis* in a later suit by the victim. Since the citizen is not likely to present as appealing a case as the victim, allowing the citizen to sue may place an extra burden on the victim of overcoming the effect of adverse *stare decisis*. For all these reasons, the courts have wisely refused to grant citizen or taxpayer standing to seek remedies for injuries to identifiable individuals.

Occasionally, an act results both in specific injury to an individual and a more general harm to a group. For example, a proposed development may harm adjacent property owners or property owners whose land is taken. At the same time, the nature of the development could result in ugliness or pollution that would effect everyone who uses the area.<sup>25</sup> The interests of the latter group are very distinct from those of the former and may make it desirable for both to sue. The property owner's interest may be satisfied by sufficient compensation while the public user can vindicate his interest only by stopping the project. Since the property owner's financial interests may run counter to the interest of the public user, standing should be granted to both groups.

The conflict between the interest of the person suffering

---

<sup>24</sup> "[M]embers of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . . ." *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). The interest of the victim is quite distinct from that of the citizen and cannot be adequately represented by the citizen alone without the victim's consent.

<sup>25</sup> This situation occurs frequently in environmental suits. See *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972).



specific injury and the interests of persons injured generally will not occur if the general injury is simply that the government acted wrongly in injuring the specific individual. Recompense for the specific injury will sufficiently satisfy the interest of the citizen. Given the possibility of both citizen and victim satisfaction by means of the victim's suit, the above mentioned reasons for granting standing only to the victim are again applicable. Thus even in the relaxed form of standing in federal statutory actions, the Court has mandated that a plaintiff show more specific injury than violation of the statute and disagreement with such action.<sup>26</sup>

*B. Political Injury Suits: Wrong Reasons for the Right Result*

Some laws or activities produce no specific harm despite their alleged unconstitutionality. When a senator is appointed to an office whose remuneration he voted to increase, the nature of the violation threatens no citizen's life, liberty, or property.<sup>27</sup> Rather, a possibility exists that the political process was skewed when the legislature voted to increase the salary for that position. Such an injury will be referred to as a "political injury." Since the right to have government follow the prescribed constitutional norms is common to all citizens, no single citizen has a better right than another to raise the issue. The lack of a victim in the sense used in the preceding discussion removes a major reason to bar the citizen suit. The willingness of a particular citizen to bring suit indicates sufficient injury and resourcefulness to allow that citizen to bring suit.

In a suit by a citizen to remedy a "political injury," the citizen plaintiff is as much a victim as any other possible plaintiff. While financial or other personal loss may occur as a result of a "political injury," it would not be the type of injury with which the violated constitutional provision is concerned.<sup>28</sup> The

---

<sup>26</sup> See *Sierra Club v. Morton*, 405 U.S. 727 (1972).

<sup>27</sup> The violation is of U.S. CONST. art. 1, § 6. Whether specific harm results was intensely debated during the nomination of William Saxbe as Attorney General. A suit claiming violation of this provision when Justice Black was appointed to the Supreme Court was dismissed for lack of standing. *Ex parte Levitt*, 302 U.S. 633 (1937). See text accompanying notes 68-69 for a discussion of the case.

<sup>28</sup> The constitutional provisions in question protect the political process from being improperly influenced and are not designed to punish the individual who might

type of injury which the Constitution forbids in these cases is that done to all citizens. In several cases subsequent to *Flast*, members of the Court have given different reasons for denying standing to such injured citizens. However, the reasons proffered have been inadequate.

1. *Abstract Nature of Issues in Suit by Citizen for Political Injury*

A "political injury" is by definition abstract—*i.e.*, no individual can show loss of property or impairment of liberty. The only loss is of the right to have the government act in a specified way. Whether the government acts in a certain way may or may not be personally beneficial to the individual. For example, whether a Congressman who is a member of the reserves will favor the military is entirely speculative—his connection may result in a very critical view of their function, while stripping him of his reserve commission may make him more rather than less amenable to military interests.

In *Schlesinger v. Reservists Committee to Stop the War*,<sup>29</sup> the Court discussed the reasons for giving preference to concrete injuries by saying:

[S]tanding to sue may not be predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. . . . This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. . . . Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decision.<sup>30</sup>

---

otherwise obtain office, etc. The constitutional right therefore is that of the citizen *qua* citizen and not of the incidentally injured individual. "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). See also *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962).

<sup>29</sup> 418 U.S. 208 (1974).

<sup>30</sup> *Id.* at 220-21.

This attack is filled with conclusions rather than reasons. The "abstract injury" also presents a "factual context." There is no speculation about what kind of conduct has occurred. The challenge which the Court raises is whether the citizen-plaintiff presents "a complete perspective upon the adverse consequences flowing from the specific set of facts." The "political injury" stems from a violation of prophylactic rules designed to prevent impropriety in the political process. For example, the rule requiring senators to be thirty years of age<sup>31</sup> appears designed to assure a quantity of experience and maturity. A particular twenty-eight-year-old person may have experience and maturity far beyond his years, but the adverse consequences of his election are that the rules have been violated and the individualization which the rules intended to avoid has become the fact. The individual who is willing to pay the costs of litigation will claim that all citizens have an interest in preventing such violations. This impetus thus insures the presentation of "a complete perspective upon adverse consequences" to the courts.

The Court in *Schlesinger* felt that denial of standing for abstract injuries furthers the principle of avoiding unnecessary constitutional adjudication. Concrete injury indicates there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.<sup>32</sup> However, the Court is bootstrapping. The interest of the complaining party in political injury cases is to preserve the kind of government which he feels the Constitution provides. The Court can find that there is no need to resolve the question only if it refuses to acknowledge the interest of the citizen in preserving the constitutional system.

Finally, concrete injury is said to assure "the framing of relief no more broad than required by the precise facts."<sup>33</sup> If the political injury consists of continued or threatened actions, the remedy will be an order requiring the cessation of the unconstitutional activities. If the act has occurred in the past and the

---

<sup>31</sup> U.S. CONST. art. 1, § 3. "No person shall be a Senator who shall not have attained to the Age of thirty Years."

<sup>32</sup> *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974).

<sup>33</sup> *Id.* at 222.

Court can only deal with the consequences of it, remedial problems may, indeed, be difficult. However, remedial solutions to concrete injuries may also be complex. Environmental injuries may not be compensable in dollar damages,<sup>34</sup> yet suits have not been dismissed on the grounds of remedial difficulty. The Court is unconvincing when it complains of possible overbreadth in remedy. Surely the Court, if it took such suits, would tread carefully to limit the disruption of the political process.

## 2. *Sporadic Nature of Review*

Justice Powell, concurring in *United States v. Richardson*,<sup>35</sup> argued that citizen-taxpayer standing should be denied because of the sporadic nature of review it would provide. Such review was felt to be an even less desirable system than that which would have been provided by the Council of Revision, rejected by the Constitutional Convention.

Unrestrained standing in federal taxpayer or citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government. Randolph's proposed Council of Revision, which was repeatedly rejected by the Framers, at least had the virtue of being systematic; every law passed by the legislature automatically would have been previewed by the Judiciary before the law could take effect. On the other hand, since the Judiciary cannot select the taxpayers or citizens who bring suit or the nature of the suits, the allowance of public actions would produce uneven and sporadic review, the quality of which would be influenced by the resources and skill of the particular plaintiff.<sup>36</sup>

On reflection, however, the irregular nature of review inherent in citizen suits may be a virtue rather than a vice. It remedies the most glaring defects of the Council of Revision. First, the citizen suit challenges only the law's constitutionality, not its wisdom.<sup>37</sup> Even if a Council of Revision were lim-

---

<sup>34</sup> See *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

<sup>35</sup> 418 U.S. 166, 189-91 (1974).

<sup>36</sup> *Id.* (Powell, J., concurring).

<sup>37</sup> The original proposal for a Council of Revision suggested a combination of court

ited to constitutional review, the power to review all legislation might tempt such a body to strike down laws with which it disagreed.

Second, should a Council of Revision limit itself to constitutional review, it would probably perform the task poorly. The volume of legislative and executive acts subject to review would make conscientious decisions on constitutionality impossible. Should the number of acts be reduced, automatic review would still make it difficult to focus on and explore the constitutional deficiencies. The citizen-taxpayer suit avoids these difficulties. The costs of litigation reduce the volume of acts to be reviewed to manageable proportions and assure presentation of sufficiently focused arguments.

Powell identifies two further difficulties stemming from the sporadic nature of citizen suits. One is that the quality of judicial review will be uneven and will depend on the wealth and skill of the plaintiff. This problem does not distinguish citizen "political injury" suits from any other suits. Victims cover the spectrum of skills and resources which they can devote to litigation. The citizen "political injury" suit is likely to be presented as well as the suit in which a "victim" urges relief.

The second concern with citizen standing is that such standing might result in most litigation being brought by a limited number of political groups which have been disappointed in the legislative process. If the challenges come only from wealthy or well-organized groups, the impact of such suits may result in some distortion of the total mass of legislative and executive action.<sup>38</sup> The impact on governmental actions will be more random if suits depend on existence of a victim. Fears of political power distortion through citizen-taxpayer suits can be greatly exaggerated. In all likelihood, groups will-

---

and executive to veto legislation. The grounds for such a veto were not limited to the Constitution. Eventually, the presidential veto was accepted by the original convention and served the purpose of Randolph's proposal. See 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* at 21 (1911); J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801* at 208-210 (1971).

<sup>38</sup> If the legislature's power is limited only at the behest of certain social groups, the resulting network of laws will favor those groups more so than if no groups or all groups challenged such laws.

ing to pay the costs of litigation do so because they feel important principles have been violated and that a court will so find. Serious affronts to fundamental principles are likely to find citizen-group challengers while baseless or trivial claims will be deterred by the costs of litigation. The few baseless or trivial claims or claims brought only to buttress a particular political position may be an acceptable price to pay to assure the integrity of governmental operations.

### 3. *Compelled Confrontation*

The justices who would deny standing to citizens and taxpayers in "political injury" suits have expressed their desire to avoid confrontation with coordinate branches of government.<sup>39</sup> However, if the "political injury" is both sufficiently serious

---

<sup>39</sup> *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring). "[R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either." *See also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974).

Repeated confrontations with coordinate branches of government can result in those branches retaliating against the courts—the legislature by its control of finances and jurisdiction and the executive through the power to appoint justices and the need for executive support to implement decisions. The heart of the Court's defense against this has been that it is only doing its duty. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

However, if a decision may rest on a non-constitutional base, the Court cannot justify reaching the constitutional issue. Many grounds exist for avoiding constitutional decisions. *See Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring):

The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' . . . 3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' . . . 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of . . . . 7. 'When the validity of an act of the Congress is drawn in question and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'

*Id.* at 346-48. Such refusal may be based on the behavior of the party seeking relief ("[t]he Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." *Id.* at 348); the lack of adversariness ("[t]he Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding . . ." *Id.* at 346); or the failure of the plaintiff to show injury ("[t]he Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." *Id.* at 347).

and suitable for judicial resolution, the wish to avoid confrontation does not justify refusal to grant standing.

The fear of confrontation or of assuming a role of "general supervision"<sup>40</sup> may be exaggerated. Citizens or taxpayers should be unable to sue when governmental action results in potential victim plaintiffs. Thus, citizens should have no standing to challenge regulatory programs; such programs produce readily determinable victims. Permissible litigation for citizens would be largely confined to spending programs and discretionary appointments.

In such cases, the substantive law of federal spending power<sup>41</sup> and discretion in appointments<sup>42</sup> would result in the dismissal of most suits for failure to state a claim. A readiness to resolve the few claims of unconstitutional action which fit within the "political injury" definition and are outside of the broad discretionary powers in the legislative and executive branches would do little to damage respect for the judiciary.

#### 4. *Adequacy of Political Remedy*

"Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents

---

<sup>40</sup> *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). Justice Powell argues that the Court has historically limited its role to vindicating rights of

individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the counter-majoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.

*Id.*

<sup>41</sup> "Congress has a substantive power to tax and appropriate for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose." *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950). See also *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>42</sup> Most cases involving appointment to government office have involved an available victim injured by dismissals, suspensions, or refusals to renew contracts. Challenges to appointments on the grounds of violating the rights of a competitor also provide a classic victim. If the challenge is based on violation of constitutional provisions for appointment, the Court has found that citizen complainants have no standing. *Ex parte Levitt*, 302 U.S. 633 (1937). Nevertheless, there are very few explicit restrictions on appointments. Most restrictions on appointments are in legislation creating the office, so issues of standing become statutory.

have no standing to sue, no one would have standing, is not a reason to find standing."<sup>43</sup> This quote from the Court's opinion in *Schlesinger* turns the argument for citizen-taxpayer standing on its head. All citizens should have a right to assure that the government is acting in a legitimate fashion. The existence of a specific "victim" will permit the Court to find that the citizen-plaintiff is not the appropriate party. However, where no victim exists, there should be no impediment to citizen standing.

The reference to the political process begs the question. Although the Constitution leaves many issues of public policy to the discretion of the legislature and the executive, few issues of constitutional interpretation are explicitly committed to those branches. Since the Constitution cannot be changed except through the amendment process,<sup>44</sup> it is largely immune from the majoritarian political process. If the constitutional provision in question is intended to protect a particular right from the majoritarian political process, the Court should not remand the plaintiff to those same processes. The critical question should center on the nature of the constitutional provision in question and whether the particular provision would be more effective if enforced by citizen suits. This issue has not been addressed by the Court.

### III. STANDING AS A FUNCTION OF INTERESTS PROTECTED BY THE CONSTITUTION: THE BETTER PLAINTIFF REVISITED

The courts have viewed standing from its own perspective—whether the plaintiff has a sufficient stake to guarantee adverse parties and whether the issue can be dealt with by the court. However, the underlying concern should be whether judicial review will best ensure that the Constitution is followed. A substantial consensus appears to favor litigation and judicial review as the ultimate assurance of constitutional obedience.<sup>45</sup> This feeling in turn involves the assumption that the Court is

---

<sup>43</sup> 418 U.S. 208, 227 (1974).

<sup>44</sup> U.S. CONST. art. V.

<sup>45</sup> President Nixon's compliance with the Court's orders in *United States v. Nixon*, 418 U.S. 683 (1974), is some evidence of this acceptance. See also C. BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (1960).



the most acceptable body for interpretation of constitutional provisions. Standing doctrine, like related justiciability issues, should be built upon assuring the acceptance of the decision and of the necessity for any resulting confrontation with another governmental branch. To ensure this acceptance, standing doctrine should be interpreted with a view toward the particular constitutional provision alleged to have been violated and whether that provision can best be enforced by citizen suits.

### A. *Individual Standing*

The Constitution explicitly prohibits certain actions. Most of these prohibitions are intended to prevent harm to the individual by the government. The standing question here is usually easily resolved; violation of such a prohibition causes injury to the life, liberty, or property of an individual. In some situations it may be difficult to find standing for violations of individual rights. In *Warth v. Seldin*,<sup>46</sup> the Court denied standing to a variety of individuals and groups who had alleged that restrictive zoning practices violated their fourteenth amendment rights. There were further problems of ripeness, mootness, and third party (*jus tertii*) standing. However, even in *Warth*, the Court was able to posit a plaintiff who would have standing because he was directly affected by the challenged act. Thus, while disputes may arise as to appropriate plaintiffs, a hypothetical legitimate plaintiff can invariably be perceived when the government allegedly invades a prohibition directed at securing individual rights. The individual victim makes standing an easy question with respect to most constitutional provisions. Since most claims alleging constitutional violations challenge provisions which protect identifiable groups, there will be a better plaintiff than an ordinary citizen in most cases.

### B. *Federalism and State Standing*

The Constitution establishes various institutions of gov-

---

<sup>46</sup> 422 U.S. 490 (1975). For factors showing who might be a proper plaintiff in a *Warth* type suit, see *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), where standing to challenge restrictive zoning practices was found for an individual who alleged that he sought and would qualify for a particular planned project that was forbidden by the zoning law.

ernment and provides grants of power to those institutions and prohibitions on particular conduct by those institutions. The grants of power are a means of allocating power among the branches of the federal government and between the federal and state governments.<sup>47</sup>

This allocation of power may serve to protect the individual citizen;<sup>48</sup> he is less likely to have legislation affect him adversely if fewer institutions have the power to do so. If the individual is deprived of life, liberty, or property through a governmental act which exceeds the powers granted the acting body, the individual will have standing.<sup>49</sup> However, if the only adverse effect is that action is taken with which the individual disagrees and believes inappropriate for the acting body to take, there is a victim with a better basis for suit: the governmental body whose power has been usurped.<sup>50</sup> In such cases, the issue raised is one of standing for the governmental body—most frequently the state.

The state may attempt to bring suit on behalf of its citizens. This effort runs afoul of two problems. First, if the citizens themselves are inappropriate plaintiffs, the state cannot obtain standing by relying on them.<sup>51</sup> Second, the proper institution to represent the citizens may be the federal govern-

---

<sup>47</sup> With respect to concepts of federalism, see U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

<sup>48</sup> See Strong, *Court vs. Constitution: Disparate Distortions of the Indirect Limitations in the American Constitutional Framework*, 54 N.C. L. REV. 125 (1976).

<sup>49</sup> If the government seeks to deprive the individual of life, liberty or property in a judicial proceeding, the individual may raise the unconstitutionality of the government's action in defense. If the act takes place outside a judicial proceeding, standing to sue may depend on whether the constitutional right allegedly invaded was for the benefit of the injured party. See *Ashwander v. TVA*, 297 U.S. 288 (1936).

<sup>50</sup> See *Flast v. Cohen*, 392 U.S. 83 (1968). The Court refers to Mrs. Frothingham's suit to prevent a federal spending program known as the Maternity Act of 1921:

In essence, Mrs. Frothingham was attempting to assert the States' interest in their legislative prerogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power.

*Id.* at 105.

<sup>51</sup> Citizens do not become more appropriate plaintiffs because some other body represents them. If the state is appropriate, it must be because of the state's interest and not that of its citizens. See *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976), which says that a State may sue only when its sovereign interests, not merely the personal claims of its citizens, are implicated.

ment.<sup>52</sup> While the state may be the guardian of its citizens vis-a-vis other states, the federal government is the guardian if the relationship under attack is national.<sup>53</sup> If the state wishes to sue on its own behalf to prevent federal action in an area which the state claims is reserved for state action, it will have standing or can create a situation in which individuals have standing if it passes legislation which conflicts with federal law.<sup>54</sup>

Thus, when the complained-of act is a product of a conflict over the allocation of powers, citizen-taxpayer standing is not needed in order to enforce a particular constitutional provision. A better plaintiff exists in the form of the offended government body. When a bona fide conflict exists over the allocation of powers, the appropriate institution will possess the requisite of adversity and a "personal stake."

### C. *Institutional Processes*

Some constitutional prohibitions are not directed at protecting individuals from injury by government but are directed at preserving the integrity of government itself. It is this group of protections which causes the greatest difficulty in standing analysis; violation of the constitutional command provides no specific victim. No individual can claim physical or economic injury, but a potential threat to the democratic processes is called into question. For example, there is a minimum age

---

<sup>52</sup> See *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

It cannot be conceded that a State as *parens patriae* may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof . . . . In that field it is the United States, and not the State, which represents them as *parens patriae* . . . .

*Id.* at 485-86.

<sup>53</sup> *Id.*

<sup>54</sup> However, the federal law may be designed to prevent such a clash. For example, conditional grants do not conflict with any state law, but merely fail to operate when the state does not meet the condition: "[T]he powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject." *Id.* at 480. If the state chooses not to legislate because it does not want the federal grant, there can be no conflict. If the state chooses to fulfill the conditions of the grant, it will benefit from the federal action and thus have no basis for suit. *Ashwander v. TVA*, 297 U.S. 288, 348 (1936). However, if the state wants the federal grant but does not want to meet all of the federal conditions, it may legislate in partial compliance with the federal grant and thus be in a position to complain that the conditions placed upon the grant are an unconstitutional invasion of state powers.

requirement for each of the offices of representative,<sup>55</sup> senator,<sup>56</sup> and president;<sup>57</sup> a prohibition on appointment of members of Congress to offices created or whose compensation was increased during their term;<sup>58</sup> a prohibition against members of Congress holding concurrently any other office under the United States;<sup>59</sup> a restriction on the receipt of presents, compensation, offices, or titles from any foreign state by a federal office holder;<sup>60</sup> and a limitation of the presidency to two elected terms.<sup>61</sup> Also, the Constitution requires publication of an account of receipts and expenditures of all public money.<sup>62</sup>

The basic purpose of these provisions is to protect the political process from recognized dangers—immaturity, self-interest, foreign domination, secrecy, or perpetuation in the form of dependence on the individual leader rather than the democratic system. While some individual may receive an injury from an action forbidden by such constitutional commands, such an injury is incidental; there is no suggestion that the violated provisions were enacted to protect specific individual interests.<sup>63</sup> Instead, these constitutional commands are drawn to protect the democratic system. Thus, some individuals have seen these clauses as appropriate for enforcement by any citizen because every citizen has an interest in a properly functioning political system.

---

<sup>55</sup> "No Person shall be a Representative who shall not have attained to the Age of twenty five Years." U.S. CONST. art. I, § 2, cl.2.

<sup>56</sup> "No Person shall be a Senator who shall not have attained to the Age of thirty Years." U.S. CONST. art. I, § 3, cl.3.

<sup>57</sup> "No Person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty five Years." U.S. CONST. art. II, cl.5.

<sup>58</sup> "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time. . . ." U.S. CONST. art. I, § 6, cl.2.

<sup>59</sup> "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art. I, § 6, cl.2.

<sup>60</sup> "[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. CONST. art. I, § 9, cl.8.

<sup>61</sup> "No person shall be elected to the office of the President more than twice. . . ." U.S. CONST. amend. XXII, § 1.

<sup>62</sup> "[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl.7.

<sup>63</sup> See note 28 *supra* for related material and further discussion.

At this point we have reason to revert to the fundamental issue—whether granting standing to such persons will best assure that the Constitution is followed. Judicial review enforces constitutional guarantees not merely through the particular orders of the Court but also by the deterrence effect which the threat of judicial response provides.<sup>64</sup> Even if citizens are denied standing to redress “political injuries,” the government official considering potentially unconstitutional action still faces the possibility of check from another body. Certain individuals or groups can force a confrontation before the courts. For example, election officials may refuse to list a candidate on the ballot because the candidate fails to meet the age qualifications. Legislators tempted to increase rewards of an office they desire may be thwarted by presidential failure to appoint or congressional refusal to confirm. Presidents tempted to keep gifts may be faced with congressional legislation to the contrary, and an executive desire to keep expenditures hidden may be defeated by a congressional command for a statement of accounts. Flagrant attempts to violate the process provisions are likely to be challenged by bodies who have no interest in seeing the Constitution violated. Thus the existence of the constitutional prohibition and the power of disinterested individuals or groups to prevent a violation secures a large measure of obedience to the constitutional dictates.

Nevertheless, individual citizens may perceive a violation of a process provision that is not attacked by any other individual or group. If such an individual brings suit to remedy the improper action, that suit will present the Court with difficulties that would not be present if suit had been brought pursuant to a statute or against an official who claims constitutional grounds mandate his actions—such as an official who refuses to list a candidate for election. The Court must go beyond merely deciding whether the act violates the Constitution. It must also develop a remedy. If the act is pending, the Court will refuse to take the case because the injury may not

---

<sup>64</sup> To some extent, this statement cannot be proved. We have, however, a deep tradition for obeying court orders. See Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965) on the extent to which judicial decisions may be ignored by government officials.

occur.<sup>65</sup> Once the act has taken place, however, the remedy will never successfully eliminate the violation.<sup>66</sup> These remedial difficulties alone do not justify a refusal to hear the case,<sup>67</sup> but they do indicate that the more focused case precipitated by another group would be preferable. The remedial difficulties which make the case awkward are demonstrated by the following.

Justice Black was appointed to the Supreme Court although he was a member of the federal legislature when pensions were established for members of the Court. A citizen later sued, claiming that Justice Black's subsequent appointment to the Supreme Court violated the Constitution.<sup>68</sup> The Court dismissed the suit for lack of standing. If the Court had taken the case, it would have faced a bewildering array of alternatives. It might have barred Justice Black from future deliberations and from drawing any salary, imposed a temporary bar until the next session of the legislature, reversed all decisions in which he participated and set them for reargument, changed orders only in those decisions where Justice Black provided the margin for decision, invalidated the pension entirely or only as applied to Justice Black, or held the appointment to be constitutional. The constitutional provision is apparently intended to prevent a vote influenced by the desire to obtain the office concerned. If the vote is taken, no subsequent penalty against the legislator will undo the vote. An attempt to undo the vote by invalidating the salary increase has several drawbacks, among them the fact that the law becomes invalid as a result of action subsequent to its enactment.<sup>69</sup>

The point of this discussion is quite simple. Whenever a "process provision" is violated, there are always individuals or

---

<sup>65</sup> This is in furtherance of the judicial policy of refusing to decide a constitutional issue before it is necessary to do so. See note 39 *supra* for further discussion.

<sup>66</sup> Even in the cases where the remedy would be fairly effective, such as forcing a statement of expenditures of public funds, there will be a period in which no such statement has been published and the delay is likely to result in some actions being taken in ignorance.

<sup>67</sup> See text accompanying notes 33-34 *supra* for a justification of this statement.

<sup>68</sup> *Ex parte Levitt*, 302 U.S. 633 (1937).

<sup>69</sup> This creates problems for those who received increased salaries prior to the legislator's appointment. The provision itself appears directed at appointment rather than at prohibiting the vote.

groups with power to raise the issues who would present a better case than the average citizen. Since the interest of those groups and individuals is the same as the average citizen's, it would be preferable for such other persons to raise the issue.

In the event that none of the more desirable groups raises the constitutional issue, there is still no significant threat to that structure of government envisioned by the Constitution. Flagrant violations of the basic process provisions are unlikely to occur. The existence of the language of the prohibition and groups with power to challenge constitutional violations will sufficiently deter violations. If the individual citizen does bring suit without the support of those groups in a better situation to present the case, the court is likely to be unsympathetic. If standing is granted, the courts may tend to favor the *fait accompli* and thereby create a body of constitutional interpretation which permits action close to the constitutional line. This in turn will weaken the arguments available to individuals and groups in a position to challenge subsequent similar acts.

The net effect of permitting citizen standing to attack "process" violations could well be to weaken constitutional guarantees. The basic interest of the citizen is in the effective operation of the system of government, yet citizen standing for violation of a process provision is likely to reduce the effectiveness of that same provision.

#### IV. NEW WINE IN AN OLD FLASK

In the recent cases in which the Court denied standing, the citizen plaintiff alleged a "process provision" violation which harmed all persons in society equally,<sup>70</sup> not a minority group which needed special protection from the majoritarian process. Even though these constitutional provisions are insulated from the majoritarian process, there are, as previously noted, sufficient checks without citizen standing.

Violation of the guarantees of establishment and religious freedom stands on quite different footing. These provisions are

---

<sup>70</sup> Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974). All citizens are entitled to a legislature without conflicts of interests and to a statement of accounts, which were the questions at issue in these two cases, respectively.

evidently intended to protect religious minorities from the religious majority. Often the standing issue poses no problem for challenges to alleged first amendment religious freedom violations. A law may either prohibit religious activity or command it, thus impinging on the liberty of the individual and producing a "victim" who has standing. Other co-religionists not directly subject to the law may be offended by it, but they have no standing. Thus, in *Doremus v. Board of Education*,<sup>71</sup> the Court held that there was no standing in citizens or taxpayers to protest Bible reading in schools although the school children themselves would have standing.<sup>72</sup>

*Flast*, however, poses a situation without identifiable victims. Instead of compelling persons to accept or reject a particular religion, the government merely gives money to one religion. The use of the governmental process to foster religious beliefs antithetical to some citizens violates the rights of those persons (presumably a minority) to be free of governmental aid to opposing religious viewpoints. Injury arising from aid to competing religions is that kind of harm which the Constitution intended to prevent.<sup>73</sup> Thus persons with views opposing those given aid should have standing. Unlike the "process" violations in which the injury is identical as to all citizens, violations of the establishment clause affect different groups. The harm is not that the violation skews the political process, but that it does harm to religion. If citizen standing were extended to include all cases of governmental acts favoring religious beliefs, it is only with respect to *Flast*-type expenditures pursuant to the spending power that the individual taxpayer will be the best "victim."

The function of the double nexus test in *Flast* is now apparent. While the citizen may claim the government has a duty to abide by the Constitution in all its acts, the taxpayer's claimed relationship to government is financial and not political. His only tenable claim is that the government not spend money in a fashion which is forbidden. Since regulatory programs affect an individual directly, the *Flast* requirement that

---

<sup>71</sup> 342 U.S. 429 (1952).

<sup>72</sup> *Id.* at 434-35.

<sup>73</sup> The establishment clause is also intended to forbid governmental involvement in religion because of the threat that it poses to the integrity of that religion.



the challenge be made to a spending and not a regulatory program serves the purposes of limiting standing to those cases in which a traditional victim cannot be found.<sup>74</sup>

The taxpayer's complaint is similar to that of the citizen in the "political injury" suit—the Constitution has been violated although no "victim" can be found. Neither claim involves a personal stake and both allege violation of an abstract right. The second half of the *Flast* test provides the crucial distinction. The requirement of a specific prohibition eliminates the ability of a taxpayer to sue to preserve an allocation of powers when others have a stronger interest in preservation. By tying the specific prohibition to the spending power, the Court avoids the "political injury" type suits which attack the decision-making process. Limitations on the exercise of power, as opposed to limitations on who can appropriately exercise it, are invariably protections directed at individuals and minority groups. Such individuals and minority groups are the only "victims" when such power is abused. Thus, the dual nexus test in *Flast* functions to isolate the case in which a governmental act transgresses constitutional provisions designed for the protection of a minority but does not impair the life, liberty, or property of any member of that group. In this unique situation, the constitutional provisions are more effectively guaranteed by granting standing to citizen-taxpayers. The filing of the suit by the taxpayer demonstrates his objection and thus places him within the group to be protected.

### CONCLUSION

The Court's decisions on citizen and taxpayer standing have focused on the difficulties, real or imagined, of hearing such suits. The opinions have not evaluated such suits as means to effectuate constitutional guarantees. Thus the twin nexus test in *Flast* appears to be artificial and insupportable. By concentrating on the interest protected by the Constitution and the need for minority protection, the requirement of a

---

<sup>74</sup> "This type of legislation is the type which is least likely to injure any individual directly; thus it could conceivably exceed constitutional limitations and never produce the traditional plaintiff." Hennigan, *The Essence of Standing: The Basis of a Constitutional Right to Be Heard*, 10 ARIZ. L. REV. 438, 449 (1968).

spending power claim coupled with a specific constitutional prohibition is intelligible. The institutions of government protect the democratic process better than citizen suits except when the challenged actions invade minority rights. In that context, the twin nexus of *Flast* serves to establish proper representatives of the affected minority—the individual whose liberty is invaded by the regulation, or the citizen or taxpayer if the only injury is financial support to religion.